

lit

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

1	STONEWAY ROCK AND RECYCLING,)	
2)	
3	Appellant,)	PCHB NO. 91-236
4)	
5	v.)	
6	PUGET SOUND AIR POLLUTION CONTROL)	FINDINGS OF FACT,
7	AGENCY,)	CONCLUSIONS OF LAW
)	AND ORDER
	Respondent.)	

8 This matter came on for hearing on February 12, 1992 in Lacey,
9 Washington, before the Pollution Control Board, Chairman Harold S.
10 Zimmerman presiding, Board member Annette McGee in attendance, and
11 John H. Buckwalter, Administrative Law Judge, as legal adviser.

12 At issue was Notice and Order of Civil Penalty No. 7479 in the
13 amount of \$1,000 imposed on Stoneway Rock and Recycling (hereinafter
14 Stoneway) by the Puget Sound Air Pollution Control Agency (hereinafter
15 the Agency).

16 Appearances were:

17 Robert L. Hines, Jr., attorney, for Stoneway.

18 Keith D. McGoffin, attorney, for the Agency.

19 Proceedings were recorded by Louise M. Becker of Gene Barker
20 Associates and were also taped. Witnesses were sworn and testified,
21 exhibits were admitted and examined, and arguments of counsel were
22 considered. A written closing brief was filed by Appellant, and a
23 reply brief by Respondent was filed with the Board on March 12, 1992.

1 From these, the Board makes these

2 FINDINGS OF FACTS

3 I

4 Stoneway is a division of Gary Marlino Construction Company,
5 Inc. Stoneway's principal place of business is the Black River Quarry
6 (hereinafter the Quarry) located at 6808 So. 140th in Renton,
7 Washington. Stoneway schedules a water truck to fill up a water
8 storage tank at the Quarry at approximately 7:15 a.m. on each
9 operational day. To control the emission of dust, the water is then
10 piped through spray bars to wet down the rock crushing, conveyor, and
11 drop area operations.

12 II

13 On July 23, 1991, the truck arrived at the Quarry at
14 approximately 6:30 a.m. and watered down the site but did not have
15 enough water to fill the storage tank. The truck returned to
16 Stoneway's Renton facility to refill with water but its return to the
17 Quarry was delayed by a mechanical failure. Contrary to an
18 established but, at that time, unwritten operational policy, the
19 Quarry continued its rock crushing operations without water until the
20 truck's return.

21
22 III

23 On the same day, July 23, 1991, at approximately 7:10 a.m.,
24
25

1 Richard J. Gribbon, a trained and certified Air Pollution Inspector
2 for the Agency since 1985, was driving on Grady Way in the vicinity of
3 the Quarry and observed airborne dust emission coming from the
4 Quarry. Inspector Gribbon drove to the Quarry and observed that the
5 travelled areas of the Quarry had apparently been wetted down recently
6 but that no water was being used to control the airborne particulate
7 coming from the rock crushing, conveyor, and drop point operations.
8 He observed also that all material coming from those operations were
9 dry, and that dust emissions were rising into the air. He documented
10 the emissions by taking two photographs, one at 7:25 and another at
11 7:31 a.m. (Exhibit R-3).

12 IV

13 Following an unsuccessful attempt to determine the license plate
14 number of a Rhine Demolition truck which was leaving the area without
15 using the wheel wash, Inspector Gribbon, at approximately 8:00 a.m.,
16 called Richard Harrington, who had been Plant Manager of the Quarry
17 for approximately six years. Inspector Gribbon notified Mr.
18 Harrington that the Quarry was operating with little or no water and
19 that a Notice of Violation would be issued to Stoneway by the Agency.

20 V

21 Mr. Harrington immediately contacted Harry Ellis, Foreman of the
22 Quarry, and was informed that the water truck had broken down when
23 returning from the Renton facility of Stoneway Concrete Company.

1 Mr. Harrington then called the Stoneway Concrete Company and was told
2 that a mechanic had been sent to repair the truck which would be at
3 the Quarry shortly thereafter. Because of the monetary loss which
4 would result, Mr. Harrington did not instruct Mr. Ellis or anyone else
5 to shut down the Quarry operations until water was made available by
6 the water truck's arrival.

7 VI

8 Shortly after 9:00 a.m. the same morning, Inspector Gribbon
9 returned to the Quarry and observed that it was still operating
10 without water and that dust emissions were still being generated.
11 Inspector Gribbon again called Mr. Harrington and again informed him
12 that a Notice of Violation would be issued. Mr. Harrington then went
13 to the Quarry at approximately 9:20 a.m. and found that the water
14 truck was on site and that the spray bars were in operation. Stoneway
15 has since added a water window gauge for easier determination of the
16 water level in the tank and has issued written instructions requiring,
17 among others, that "Control equipment must be used whenever
18 contaminant sources are in operation".

19 VII

20 On July 25, 1991, the Agency issued Notice of Violation No. 27854
21 to "Stoneway Concrete - Black River Quarry". On July 26, 1991 by
22 Notice and Order of Civil Penalty No. 7479 (hereinafter Order 7479),
23 the Agency imposed a civil penalty of \$1,000 on Stoneway for violation
24
25

1 of three sections of the Agency's Regulation 1 (noted below). It is
2 this penalty which was appealed by Stoneway and is under consideration
3 at this time.

4 VIII

5 Any Conclusion of Law deemed to be a Finding of Fact is hereby
6 adopted as such. From these Findings of Fact the Board makes these

7 CONCLUSIONS OF LAW

8 I

9 The Board has jurisdiction over these parties and this appeal.
10 Chapters 70.94 and 43.21B RCW. Because this is an appeal of a civil
11 penalty, the Agency has the burden of proof.

12 II

13 In Order 7479, the Agency described the alleged offense as:

14 *Caused or allowed the emission of fugitive dust from rock*
15 *crushing conveyors, and drop point operations, without using best*
16 *available control technology to control emissions, and in*
17 *sufficient quantities to be injurious to human health, plant or*
animal life at the Black River Quarry site, 6808 South 140th
(Monster Road) in Renton, Washington.

18 Stoneway contends that the Agency's definition of "fugitive dust"
19 as stated in its Regulation I is contrary to that of the Federal Clean
20 Air Act as articulated by the Federal Court of Appeals in Alabama
21 Power Company vs. Costle, 636 F.2nd 323 (D.C. Cir. 1979) and that
22 "Where state law is contrary to federal law, judges must rule in favor
23 of federal law pursuant to the Supremacy Clause of the U.S.

1 Constitution." (Appellant's closing brief, pp. 6/7). Stoneway then
2 concludes that it was not emitting fugitive dust as defined by federal
3 law and thus was not in violation of the Agency's Regulation I.

4 III

5 In considering Stoneway's theory, the Board relies on:

6 Yakima Clean Air v. Glascam Builders, 85 Wn.2d 255 (1975) at 257:
7 An administrative tribunal is without authority to determine the
8 constitutionality of a statute. . .

9 J. W. Adams v. City of Seattle and DOE, SHB 156 (1975), citing
10 Yakima:

11 An action of a (municipality) must be presumed (by the
12 Board) not to violate the United States and Washington
13 Constitutions.

14 Grader v. Lynnwood, 45 Wn. App. 876 (1986) at 879, citing Yakima:
15 Grader also contended that the City's interpretation would
16 render the ordinance unconstitutional. The hearing
17 examiner declined to resolve the constitutional issues
18 raised, properly finding that these were matters only the
19 court could address.

20 The Board concludes that Stoneway's interpretation of the alleged
21 conflict between Federal and Agency definitions would render the
22 Agency's regulation unconstitutional, that such a determination does
23 not fall within the Board's jurisdiction, and that the Agency's
24 Regulation is presumed constitutional by this Board and is controlling
25 in this matter.

26 IV

27 The Agency charged Stoneway of violating three sections of the
Agency's Regulation I. The first was Section 9.15(a):

It shall be unlawful for any person to cause or allow the
emission of fugitive dust unless such person uses the best
available control technology to control the emissions.

1 Absent any adverse contention the Board concludes that Quarry's
2 water spray system is the "best available control technology" to
3 control dust emissions. However, the unrefuted evidence is that the
4 system was not in operation at the time of the cited condition on July
5 23, 1992. The Board concludes that on that date the Quarry's water
6 spray control was not in operation and that fugitive dust was being
7 emitted in sufficient quantities to make it apparent to Inspector
8 Gribbon as he was driving past the Quarry.

9 The Board affirms the charge of violation of the Agency's
10 Regulation I, Section 9.15(a).

11 V

12 The second violation charged was Section 9.15(c):

13 *It shall be unlawful for any person to cause or allow the*
14 *emission of fugitive dust from any refuse burning equipment, fuel*
15 *burning equipment, equipment used in a manufacturing process, or*
control apparatus.

16 The Board concludes that Stoneway both caused and, by continuing
17 its operations without taking corrective action after the first
18 notification at 8:00 a.m., allowed the emission of fugitive dust from
19 equipment used in its manufacturing process.

20 The Board affirms the charge of violation of the Agency's
21 Regulation I, Section 9.15(c).

22 VI

23 The third violation charged was Section 9.15(d):

24 *It shall be unlawful for any person to cause or allow the*
25

emission of fugitive dust in sufficient quantities and of such characteristics and duration as is, or is likely to be injurious to human health, plant or animal life, or property, or which unreasonably interferes with enjoyment of life and property.

Inspector Gribbon testified that he performed no tests as to the quantities or characteristics of the dust emissions he observed. There was no evidence presented that the quantities were of such quality, magnitude, or duration that the emissions were or were likely to be injurious to human health, plant, animal life, or property or the enjoyment thereof.

The Board concludes that the Agency did not meet its burden of proof as to the alleged violation of Section 9.15(d).

VII

In its Appeal, Stoneway asks, as an alternative to vacation of the Agency's order, for the substantial reduction of the \$1,000 penalty imposed by the Agency and alleges that the it was imposed because of the Agency's "premature" assessment of the Quarry activities on July 23, 1992.

The Board does not find either the Inspector's actions or the Agency's issuance of Notice and Order of Civil Penalty No. 7479 premature. On the contrary, the Board places great weight on Stoneway's failure to take any corrective action between their first 8:00 a.m. notification by the Inspector and the Inspector's subsequent observations at 9:00 a.m.

VIII

The Board also takes note of the prior fugitive dust emission charges levied against Stoneway by the Agency Notice and Order of Civil Penalty no. 7296, October 24, 1990, for violation on August 14, 1990 of the same Section 9.15(c) charged and affirmed above. The \$1,000 penalty assessed therein was reduced by the Agency to \$500 on the promise of Stoneway that it "does hereby agree to an assurance of discontinuance from violation of Article 9, Regulation I..." (Consent Order and Assurance of Discontinuance, exhibit R-6). The \$500 suspension was conditioned on Stoneway's having "no unexcused violations occur within two years." Stoneway has not met this two year period.

IX

While the Board notes that Stoneway has installed a new gauge to help control the storage tank water level and that written procedures have been issued to Quarry personnel which appear to require that operations be shut down if water is insufficient, the Board at this time can put no more reliance on their effectiveness in the prevention of future dust emission occurrences than was shown in Stoneway's failure to meet its former two year "probationary" period promise.

X

The Board concludes that no mitigation of the \$1,000 penalty is warranted.

XI

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such. From these Conclusions of Law the Board enters the following

ORDER

Puget Sound Air Pollution Control Agency Notice and Order of Civil Penalty No. 7479 is AFFIRMED as to violations of Regulation I, Sections 9.15(a and c), is REVERSED as to violation of Section 9.15(d), and the civil fine of \$1,000 is AFFIRMED.

DONE this 27th day of March, 1992.

POLLUTION CONTROL HEARINGS BOARD

Harold S. Zimmerman
HAROLD S. ZIMMERMAN, Chairman

Annette S. McGee
ANNETTE S. MCGEE, Member

John H. Buckwalter
JOHN H. BUCKWALTER
Administrative Law Judge